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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1902.

Supreme Court U. S.
FILED
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JAMES H. MCKENNEY,
Clerk.

No. 217.

COSMOS EXPLORATION COMPANY,
Appellant,

against

GRAY EAGLE OIL COMPANY *et al.*,
Appellees.

No. 218.

PACIFIC LAND & IMPROVEMENT COMPANY,
Appellant,

against

ELWOOD OIL COMPANY *et al.*,
Appellees.

REPLY BRIEF ON BEHALF OF THE APPELLEES.

F. H. SHORT,
J. S. CHAPMAN,
Attorneys for Appellees.

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Reply Brief on Behalf of the Appellees.

Believing as we do, that if it be possible to arrive at the real contention between the parties in these causes they will be half decided, we for the purpose of developing that controversy consider certain portions of the brief of the appellants wherein they appear to state their position.

First.

On page 9 of the brief of appellants there will be found this passage:

"Complainants claim that a selection of public vacant land, open to settlement under the Forest Reserve Lieu Land Act, June the 4th, 1897, * * * in exchange for a similar area of patented land in a forest reservation deeded to the government, *operates instantly as an acceptance of and a full compliance with the terms of the offer of exchange contained in such act* and thereupon the exchange is fully consummated and the complete equitable title to the selected land vests *eo instanti* in the selector, and that such equitable title cannot be affected or impaired by subsequent discovery of mineral on the selected lands."

The latter clause, namely, that such title cannot be affected or impaired by a subsequent discovery of mineral on the selected land, may be for the moment eliminated, and the passage stands as the clear expression of the view of our adversaries, namely, that when they presented the deed, abstract, etc., at the local office that very fact operated instantly as an acceptance of and full compliance with the terms of the offer of exchange, so-called, and the exchange was fully consummated and the complete equitable title to the selected land vested immediately. Why counsel should have limited it to the equitable title is not very apparent, for if the exchange was fully consummated both legal and equitable title vested. However, we shall take them according to what it is obvious they actually mean, without criticism of the terms in which that meaning is expressed.

They meant that the equitable title was vested, and if it was, then from that time forward the United States was the owner of the land relinquished, the selector was vested with a complete

equitable title, and the United States held the legal title, with no other function to perform and no further power over it, than simply to convey that legal title by the usual means, namely, a patent to the selector. This, as we have said, is a position that it seems to us must be maintained before any sort of an action could be brought by these appellants with respect to the title to this land. We have no doubt that it is true, that where there is this completed equitable title and the party awaits only the due course of business in the Department to obtain the legal title, a suit may be brought in a Court of equity to preserve the property from destruction in the meantime. To be sure, no such suit has been brought here, but we are not now particularly criticising the bills filed here, but are dealing with the rights of the appellants in the lands, and if they had paused with the passage which we have quoted their position would be perfectly clear.

But we now call the attention of the Court to the very next clause or paragraph in the brief, following immediately after what we have quoted, and on page 10 they continue thus:

"That the Land Department after such a selection is made *may inquire into and determine as to whether or not the land selected was under the law subject to selection when selected*, but that such inquiry when made is confined to the known character and condition of the land selected *at the date of selection*, and cannot take into consideration any subsequent discoveries of mineral made thereon."

Is not this admission absolutely irreconcilable with the position which they had just taken? When it is admitted that after such selection is made the Land Department may *inquire into* and *determine* as to whether or not the land was subject to selection it is of course admitted that this is something

more than mere trifling with time, and is not an idle performance having no final result other than registering the conclusions which the selector himself had arrived at with respect to that question. When it is admitted that the Department may inquire into and determine whether or not the land was subject to selection, we say it is admitted that the Department then acts in a *quasi*-judicial capacity, and that the result of this inquiry may be that the Land Department becomes satisfied that the party is not the owner of a tract of land in a forest reservation in fee-simple; that the land selected was not subject to selection, and having become so satisfied the determination which that Department may and will reach under such circumstances is that the selection cannot be approved, but must be rejected. And if such a determination may be reached, and such a judgment is given in any particular case, we ask now what is the result of that rejection? Has it the effect of divesting a title which had divested, or is it a determination that there never was any title? If the Department concludes and adjudges that the land was not at the date of selection, whatever time that may mean, subject to selection, is it not the determination that no title, legal or equitable, ever did vest? But if this selection, thus made by the party desiring to relinquish and select, does of itself vest the full and complete equitable title in one case it does so in all, and when the Department has determined that for any reason the selection will not be approved and rejects it, then if there ever was an equitable title it would be by that judgment divested. But that is not the case, and this admission is clearly an admission that no title, legal or equitable, was vested, but that when the selector designates the land which he desires and has

relinquished the lands in a forest reserve in lieu thereof, it is then, and not until then that the judicial power of the Land Department with respect to the subject-matter is called into action. The government did not offer to any claimant in a forest reservation any particular lands in lieu of the tract owned by him in such reserve. In no proper sense can that statute be said to be an offer at all. What it actually said was that "in cases in which a tract covered by * * * a patent is included in the limits of a public forest reservation the owner thereof may, *if he desires to do so*, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his patent." It is plain from this language that no duty on the part of the Land Department arises until the owner has made known his desire to relinquish a tract to the government and relinquishes it, and designates the tract which he desires in lieu thereof. Then for the first time it becomes the duty of the Department to inquire and determine every question necessarily involved in the administration of the act, including the question of whether the land is vacant and open to settlement. And this power we say is not ministerial but judicial, and the equitable title we say again does not vest until that selection is approved, or in other words, until it is determined by the Department that the selector is the owner of the tract in the forest reserve covered by patent, and that the land selected was subject to selection.

What immediately follows in the brief of our adversaries on page 10 sheds no light upon the particular question which we are discussing here. When they say that public land, vacant and open to settlement, within

the meaning of this act is any land that is not taken, appropriated or reserved on the books of the United States Local Land Office, and second, whenever it is not known to contain valuable mineral deposits, this has nothing to do with the question of whether any title is vested until the determination by the Department. These propositions may both be admitted for the present purpose, but that does not do away with the admission by our adversaries that after the selection is made the Land Department may inquire into and determine whether these lands were subject to selection or not, and that Department may ascertain that they are not taken, appropriated or reserved on the books of the United States Local Land Office, and that valuable mineral deposits were not known to exist therein at that time, and therefore the selection is good; but manifestly the Land Department may arrive at the conclusion that those conditions did not exist, that the land was taken, appropriated or reserved on the books of the United States Local Land Office, or that valuable mineral deposits were known to be contained therein, and therefore that the application should be rejected. It is not a question of what conditions or what facts must be found to exist in order to justify rejection, or what facts when found will justify approval, but it is the fact that whatever may be these conditions, it is for the Land Department to inquire and determine upon their existence. That, we respectfully submit, proves conclusively that the case is not different from indemnity school selections, or railroad selections, or any other selections under other laws of the United States.

Whenever it is said that the law leaves it to the Land Department to determine whether the facts exist which entitle the party to the land selected, then it necessarily follows that the selection is not

made until it is approved. Furthermore, while it is true, as said on pages 10 and 11 of the appellants' brief, that we do insist that the discovery of mineral in the lands selected at any time before this equitable title has vested will defeat the selection, yet the fact that we may be mistaken in this still does not affect the question which we are here discussing, and this, we think, will manifestly appear when we again state wherein the differences between the Honorable Secretary of the Interior and the appellees are to be found.

The appellees do not now, and never did, deny the point of time at which this inquiry is to be directed, nor that that point of time is exactly what the counsel for the appellants say it is, and what the Honorable Secretary of the Interior states to be that point, namely, when these parties presented their application for these lands in lieu of those in the forest reserve, so far as the character of the land selected is concerned, that is the period at which the inquiry is to be directed. But if in one of these cases (which is sufficient for the illustration), if the appellants had been entitled to a further hearing at all, and that hearing had been ordered, then the whole question so far as the character of the land was concerned, would have been, were those lands at that date vacant, whatever may be the sense of that term, and open to settlement? If mineral lands at that date they would not have been open to settlement; that much is conceded. But this is supplemented by the assertion that mineral lands, and known mineral lands, are in legal contemplation one and the same thing, and that if they were not known to be mineral at that moment of time the fact that they had been subsequently discovered to be mineral would not affect the right, and therein lies the one difference between the opinion

of the Land Department and the contention of the appellees and protestants in those cases. We say first, that the laws as they now stand do not anywhere contain the exception, as it was stated in the Pre-emption Law, namely, of "known mines and known salines", but the exception in the Homestead Act is of mineral lands. Furthermore, we contend that if we read into the law the term "known minerals" instead of what the law actually is, still, when that phrase was a part of the statute, it was held both by the Department and in the courts, that known mines and known salines meant *known at the date of the sale, or the date of the final entry*, and it was for this reason that a Pre emption claimant, though he may have resided upon and cultivated and improved the land for three, five, or ten years, when he came to make his final proof and pay the money and obtain his patent receipt, might find his claim defeated by the discovery of the fact that the lands were mineral lands forty-eight hours before he offered that proof. Why?—because the date of the sale was when he made that proof and paid the money, and his proofs were accepted. And in the case of the Homestead claimant, he too might find himself defeated, his proof rejected, because the land had been discovered to be mineral land forty-eight hours before he offered his final proof, and this because as is said in some of the cases which we have cited, that while the original act of appropriation by the homestead claimant may be and is called an entry, yet the date at which these known salines and known minerals must exist is the date of the final entry.

Now if we are correct in saying that the sale is not made by the presentation of these papers at the Local Office, that the exchange is not finally consummated, as our adversaries claim, that the

full completed equitable title does not vest at that time, then we submit that the principle for which we are contending is decided fifty times over both by the courts and the Land Department. Even if we read into the act, that to defeat this application the lands must *be known* to *be mineral*, yet the question still remains, known when?—and the decisions under all the previous acts hold known at the time of the sale or final entry. And this application is not any entry at all, for as we have said the whole power of the Register and Receiver of the Local Office is to be found in the regulation of the department which directed those officers to receive these papers, not to investigate, not to hear or determine anything, but to transmit them to the Commissioner of the General Land Office for his consideration, and to send with them a certificate as to the condition of the local records with reference to those lands; and we say therefore that there was no such determination here, as is claimed by the counsel, by the mere acceptance of these papers by the local officers under the direction of their superiors with this limited power, specifically prescribed, of transmission to Washington, and there was no final or any other entry, and no sale, and no exchange.

Now, the position of the Land Department was that, while all this might be true, yet the inquiry was directed to the conditions at that time, which, as we have said before, we admit. We admit that if the lands were vacant at that time no subsequent settlement or occupancy could in any way defeat or impair the rights of these selectors, and we admit that if such a thing were possible as the lands not being mineral at that time, but should subsequently become so, that could have no effect upon the rights of these applicants, and this narrows it down to the precise point wherein counsel for the

mineral claimants differed from the Land Department, and the only point of difference, to wit, is the discovery of mineral in these lands subsequent to the presentation of these papers changing the condition, or is it the evidence by which a condition existing at the time of the presentation of those papers is made known?

Suppose some convulsion of nature had made a rift through these lands which exposed to the view of the world the petroleum deposited underneath the surface, and that upheaval had occurred subsequently to the presentation of these papers, then, if the proposition be well taken at all, the answer still would be that it did not affect the rights of these applicants. Suppose there had existed at the time these papers were presented some gulch or deep cut on these lands which had thus exposed the petroleum existing therein, but in some spot in a deep ravine which no one had visited and no one had seen, and subsequently to the application and prior to its approval or rejection, or, hearing at all, somebody had discovered it and seen the oil exuding therefrom, upon the theory contended for by the appellants and decided by the Department it could have made no difference, certainly could not, for this subsequent discovery and the proof thereof is simply the means by which it is made known to the Department that the lands were mineral lands all the time, and we repeat that this is not a change in conditions but a change in the evidence of those conditions.

Thus much we have said upon this latter question for the purpose of more distinctly and fully developing wherein the controversy lies, and the points of difference with our adversaries are that we say no exchange is affected, no title, legal or equitable, is vested by the mere application for that title; that under this act, no more than under any other that

Congress ever passed, was it committed to the judgment, or discretion of one who was seeking the title of land from the United States Government, to determine and adjudicate that the facts upon which his right depended existed, but in all cases it is the Land Department that must determine these questions, and that until that determination is made, the equitable title does not vest. In other words, until the proceeding has reached that stage where inquiry is ended, and a final entry, or final payment, is made, the equitable title does not vest.

Second.

Still considering this same question, but from a slightly different point of view, or rather, discussing it in the light of the principle upon which the contention of our adversaries is said to be founded, we call attention to the form in which this principle is expressed, namely: that when a party has complied with all the terms and conditions necessary to the securing of title to a particular tract of land, then there is vested in him an interest, and he is regarded as the equitable owner thereof. It was contended by Mr. Ward that this is the test of the right of the complainants in these bills, and furthermore, that when they presented these papers at the Local Office they had done all that the law required of them, and therefore that this vested equitable interest accrued at that time. The Honorable Secretary of the Interior states the proposition in form not greatly different. Thus in the *Kern Oil Company* vs. *Clarke*, 30 L. D., 550, 556, he says:

"When do rights under the selection become

vested ? In the disposition of the public lands of the United States, under the laws relating thereto, it is settled law : (1), that when a party has complied with all the terms and conditions necessary to the securing of title to a particular tract of land, he acquires a vested interest therein, is regarded as the equitable owner thereof, and thereafter the government holds the legal title in trust for him ; (2), that the right to a patent once vested is for most purposes equivalent to a patent issued, and when in fact issued, the patent relates back to the time when the right to it became fixed ; and (3), that the conditions with respect to the state or character of the land, as they existed at the time when all the necessary requirements had been complied with by a person seeking title, determine the question whether the land is subject to sale or other disposal, and no change in such conditions, subsequently occurring, can impair or in any manner affect his rights."

With this statement of the propositions we are in full accord, and so far as these particular cases are concerned we are not aware that it is very material whether the application made of the principle is technically accurate or not ; but one of the questions here necessarily involved is the construction of the statute, and while in these particular cases the Honorable Secretary of the Interior in the controversy before him, showed that these parties had not complied with the principle here announced as the Department understands it, yet nevertheless it might at some future occasion, and in other controversies become of great importance, that the meaning of the statute, and of the doctrine here announced, shall be made clear and certain, and in the opinion delivered by the Secretary it is made apparent, that in his judgment if these parties had presented the non-occupancy affidavit and the non-mineral affidavit required by the regulations, at the time these applications were made, and if at

that time the lands had not been occupied and were not known to be mineral, a right to the title would have accrued, and that the case would have been such that the duty of the Department subsequent to that time would simply have been to inquire as to the conditions existing at that time, and that one of those conditions would have been as to whether it was known to be mineral at the time of such application. We desire to call attention now to the authorities upon which this conclusion is based, for the purpose of showing that this statement of the principle upon which the right depends, is not a whit different from that for which we are contending, namely, that no title does accrue, legal or equitable, until the Department has made that inquiry, and determined it. We shall not undertake to review these authorities more than to call attention to what they are stated to decide.

In *Carroll* vs. *Safford* (3 How., 441, 461), cited in 30 L. D., 556, in the case above referred to, in the *Kern Oil Company* vs. *Clarke*, the very first sentence quoted is (italics ours),

"Lands which have *been sold* by the United States, can in no sense be called the property of the United States. They are no more the property of the United States than lands patented. So far as the rights of the purchaser are concerned, they are protected under the patent certificate as fully as under the patent. When sold, the government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser, and a second purchaser would take the land charged with the trust."

But now this is in perfect accord with all the decisions, and it is submitted that the condition stated cannot possibly exist until that has been done which we claim must in all cases be done before any legal or equitable title vests. Lands are not sold by the United States until the Department or other tri-

bunal to which the administration of the law is committed, has determined that the conditions required by the statute to the making of the sale, exist. In *French* vs. *Spenser*, (21 How., 228), cited on the same page, there had been a military land warrant located on the tract of land, which thereafter, but before the issuance of the patent, had been sold by the locator. It was held that rights under the land warrant vested upon location, that the patent when issued related back to the time of location. But now the statement of the fact, namely, that the military land warrant had been *located*, showed that the Department had passed upon it, and accepted the warrant and made the entry which constituted the location. The case was not different from a pre emptor who had made his proof and payment and the entry had been permitted, or a homestead claimant who had made his final proof and the final entry had been admitted. In *Witherspoon* vs. *Duncan*, (98 U. S., 656), cited by the Honorable Secretary in 30 L. D., 557, it was said that in no just sense can lands be said to be public lands after they had been located at the land office and the survey of entry obtained. If public lands before entry, after it they are private property. But that entry is not permitted until it is determined that the conditions, upon which the right to make the entry depend, exist. *Stark* vs. *Starrs*, 6 Wall., 402, cited on the same page (557), is exactly to the same effect. Before the passage of the act there referred to, Stark's claim had been surveyed, the required proof of settlement and continued occupation and residence made, and such steps had been taken as to perfect his right to a patent, and that right once vested is treated by the government when dealing with public lands as equivalent to a patent issued. The same thing is decided and the same language employed in *Barney*

vs. *Dolph*, 97 U. S.. 652, cited on the same page. *Wirth* vs. *Branson*, 98 U. S., 118, is the case mainly relied upon by our adversaries, and is also cited by the Honorable Secretary, 30 L. D., 557: In that case the proposition is stated in the form most agreeable to the appellants here, namely, that a person who complies with all the requisites necessary to entitle him to a patent in the particular lot or track is to be regarded as the equitable owner thereof, and the land is no longer open to location.

"The public faith has become pledged to him, and any subsequent grant of the same land to another party is void, unless the first location or entry be vacated or set aside."

Now this case is cited in the case of the *Benson Mining Company* vs. *The Alta Mining Company*, 145 U. S., 428, and in which latter case the principle here contended for is laid down and its meaning is made perfectly manifest. In the *Benson Mining Company's* case an application was made for a patent under the mining laws, and the statute itself provides that if no adverse claim is filed with the Register and Receiver of the Local Office within sixty days after the publication of the notice as required by the statute,

"it shall be assumed that the applicant is entitled to a patent upon the payment of five dollars per acre, and that no adverse claim exists. In other words, when the price is paid the right to a patent immediately arises, and if it is not issued at once it is because the magnitude of the business of the Land Department causes delay. But such delay in the mere administration of affairs does not diminish the rights flowing from the purchase, or cast any additional burden on the purchaser, or expose him to the assaults of third parties" (145 U. S., pp. 431, 432).

Now that this is all that is meant by this form of

stating the rule, is, we submit, obvious, and is made distinct and unequivocal in the case last cited.

In this same case, on p. 432, it is again said (italics ours):

"That whenever in cash sales the price has been paid, or in other cases, all the conditions of *entry* have been performed, the full equitable title has passed, and only the naked legal title remains in the government in trust for the other party, in whom are vested all the rights and obligations of ownership,"

and here the case of *Carroll* vs. *Safford*, 3 How., is cited, where it was held that after the price had been paid and the purchaser has received his Receiver's Certificate, the lands were subject to taxation, although the patent had not issued, and it was added that they are no more the property of the United States than lands patented. But we again respectfully submit that there is not any single case cited upon this subject, or in support of this proposition, in which it does not distinctly appear, that the meaning of the phrase, "has done all that is required of him" includes the payment where payment is required, or a final entry, in other cases, or whatever else may express the approval of the Land Department, as a part of those things which he has to do. Hence, we say that expressing it in this form is not the expression of a different principle from that for which we are contending, but exactly the same thing. Now let us again turn to the admission made by the counsel for the appellants, and to the action taken by the Department in these very cases, and inquire what is the result of the presentation of these papers?

Let us suppose that the papers themselves had been all which the law (including within that term the reasonable regulations of the department) re-

quired, namely: that there should have been the the deed presented, the identification of the lands sought in lieu made, the affidavit of non-occupancy and non-mineral character of those lands, and the abstract of title, all complete in form; it is by our adversaries admitted, by the Honorable Secretary implied, that after this is all done, yet still the Department may inquire and must inquire, into these conditions. What is claimed is that the inquiry must be directed to that time. This we say again we do not deny. But is it consistent with the proposition that a title is vested? If the applicant has made an affidavit that he knows these lands, and they are not at that time occupied by anybody, that affidavit may be false. If he says it is not mineral land, that no mining operations have been carried on upon it within a year, that might be false—would have been false in these cases if the affidavits on the other side were to be believed. And it is again submitted that the very power to inquire and determine, carries with it the power to determine whether those affidavits are false, as well as whether they are true, and it is conceivable at least that the Department may ascertain the fact to be, either that the statements are true, or that they are false, and may approve or may reject the application. This being so, now let us ask (and we are here in these questions referring to the very propositions decided in the cases cited upon this subject), in this state of the case—the matter being yet undetermined as to whether these papers are proper, whether the applicant is the owner of the land in a forest reserve or not, and whether the lands selected are vacant or open to settlement—we say in this state of the case, have the lands "been sold by the United States?" Are they "no more the property of the United States than lands patented,"

so far as the right of the party who has presented these papers is concerned? Are they protected as fully as under a patent? Does the Government until the patent issues hold the mere legal title in trust for the purchaser? Does their character as public lands cease, and they become private property? Did the right to the patent become so far vested that it is equivalent so far as the Government is concerned to a patent actually issued? Was the execution and delivery of the patent after the right to it was complete, the mere ministerial act of the officer charged with that duty? Did the public faith become pledged to him that that patent should be issued?

If these questions be answered in the affirmative, then pray, why did the right of inquiry exist, or what was there to inquire into, and what determination could be made in the matter? Is it not perfectly apparent that before that stage is reached where these questions can be answered in the affirmative, the inquiry must have been made, and a determination reached? But if these questions are answered in the negative, with respect to these applications under the Forest Reserve Lieu Land Act, in the stage of the proceedings which we have supposed, then the very cases relied upon, the very decisions which have settled that when the purchaser or applicant has done all which the law requires him to do, do necessarily mean, and do in their very terms include, the determination by the tribunal authorized by the acts of Congress, (which in these cases is the Department of the Interior,) of the existence of every fact and condition upon which the right to that entry has been made. Now, that the Secretary of the Interior did not differ from us in any particular except simply as to the question of whether evidence of a subsequent discovery of a mine would be admissible on the hearing of this con-

troversy after the presentation of the papers, is shown by the very judgment rendered in these cases. Having shown that within the meaning of this rule as the Honorable Secretary understood it, the applicants in these cases had not done all that was required of them, the judgment which followed was as follows:

"In view of the admitted present occupancy and known value of the land for mining purposes, as hereinbefore stated, it is apparent that the required proofs cannot now be supplied, the *selections are accordingly rejected*, and the order of your office directing a hearing is hereby vacated" (see 30 L. D., 569).

Let it be noticed here that this judgment does dot cancel, annul, vacate or set aside an *entry* made, for the Department evidently did not consider that there was any entry made, but the selections were rejected.

Let us now before leaving this subject point out wherein we think the mistake as to the applicability of this proposition to a forest reserve lieu application, which has gone no further than the presentation, lies, a mistake which his Honor Judge Ross shows that he also had fallen into. It is in supposing that the presentation of this deed to the local officers was a payment. That it is not such payment, whatever view we may take of the meaning of the act in question is apparent. Your Honors' attention has been called repeatedly to the exact terms of the act, and it is set out in the 30 L. D. 551, as well as scattered all through these records. In cases in which a tract covered by patent is included within the limits of a public forest reservation, a settler or owner may if he desires to do so relinquish the tract to the government and may select in lieu thereof a tract

of vacant land not exceeding in area the tract covered by his claim or patent. As was stated in the oral argument, this language is susceptible of two constructions, one is that simultaneously with the presentation of the deed, a selection of an equal area of public lands vacant and open to settlement, must be made; the other, that the deed of relinquishment may be made whenever the party desires to make it, and having made it he may thereafter go forth and find some spot that he would like to take in lieu of the lands relinquished and may then apply to the Department to make the selection, furnishing the affidavits required, showing the condition of the lands selected. In the course of the administration of this law, and in the opinions and instructions which have been delivered by the Department upon it, some sanction may be found to either of these constructions. We do not see how the former can be very well reached without being fatal to the appellants here in all of these cases. But leaving that out of sight, and supposing that either interpretation may be given to this language, we say in neither of them does the presentation of the deed to the local officers constitute a payment, though accompanied by all the other papers. And Why? As we have said, under the regulations the local officers have no power to even consider it, much less to take any evidence upon it, and determine any matter of fact upon which the right of selection depends. Their duty ends with the transmission of the papers to the Commissioner of the General Land Office. Now we have already said in the opening brief that there is no delivery of a deed until its acceptance, and whenever it is conceded, as it is here, that after the papers have been presented at the Local Office the Department may inquire and determine, etc., it follows necessarily that they do not accept the deed until they

have said that the conditions are such as required by the statute, and that the selection is approved. This, of course, would amount to an acceptance of the deed, and as that acceptance would constitute the only consideration which the government has demanded for the lands, and the case would be then precisely as though a pre-emptor had made final payment, or a homestead entry-man had made final entry, or a railroad or state indemnity selector had presented a selection, and the Secretary of the Interior had approved it. But until the deed has been accepted, so far forth that the title to the one tract vested absolutely in the United States, and the title to the other has vested in the selector, then the rule here relied upon has not been met under the terms of the very cases invoked in its behalf. But now let us suppose that the other construction is true, that the owner of lands in a forest reserve desires to relinquish these lands, and, so desiring, that he has relinquished them ; has made his deed, and had it recorded, and delivered it to the United States, and the title has vested in the United States, and the lands are relinquished ; that he then goes forth and finds a tract of equal area with the land relinquished, and makes his application, accompanied by the affidavit, and says "I desire this land in lieu of the land relinquished by a certain deed," describing it, which deed is accompanied with the abstract of title. Now on this supposed case we submit that it cannot be said that this particular tract selected is paid for by the deed. That deed under the supposition was already made, the title had already passed to the United States, and the passage of that title did not impose upon the Government of the United States the duty to convey a particular tract of land to him, but any tract of public lands vacant and open to settlement of equal area, and if, when this equal

area is selected, the Land Department may and must inquire and determine, then, until the determination is made that the lands are subject to selection, and that the selection is approved, does the land relinquished operate as a payment for that particular tract? Certainly not. It may never be approved, and the government does not accept the deed as payment for the particular tract, until it has ascertained that the tract is of the kind subject to selection. Therefore we say that in neither case, under any construction, has that condition arisen which was always in all of the cases one of the essential conditions to the vesting of this equitable title, this severance of the tract selected from the public domain, this cessation of the title of the United States, and its transmission to the selector.

Now our adversaries never cease in their somewhat bitter complaints of Judge Ross because in these cases he is said to have changed his opinion, and to have decided here the very opposite to what he had decided in the case of the *Olive Land & Development Company* vs. *Olmstead et al.* But Judge Ross himself has shown that the opinion in the latter case passed upon a misunderstanding of the facts applicable to that case, and other facts which may not have been applicable. The opinion of Judge Ross is printed in the case of the *Cosmos Exploration Company* vs. *Gray Eagle Oil Company et al.*, No. 217, and by stipulation it is omitted from the *Pacific Land & Improvement Company* case, it being stipulated that it need be printed in only one of these records, and Judge Ross in that opinion tells us exactly what the differences between the two cases as they appeared to him are. First, no such affidavits as these of Mr. Ward and Mr. Wylie were before him in the *Olive Land* case. If they had been the

bills would have been dismissed just as in this case (see Transcript case No. 217, p. 48). He also says that, when in the *Olive Land & Development Company* case he said "the motive of the selector was immaterial," he was referring to a cause where the party appeared to be seeking his own rights without interfering with any right on the part of the defendants, and that "motive", as said by the Circuit Court of Appeals in the case of *Hanchett* vs. *Chiatovich*, 101 Fed. Rep., 742, 746, "does not count where one merely exercises his own right, without violating any right of another, but when he does violate the right of another, the motive of the act enters largely into the problem." But to come directly to the present point, he said that in the *Olive Land & Development Company* case there were not only no affidavits of any kind presented to the Court, but neither in the oral argument nor in the briefs there presented, were any rules or regulations prescribed by the Land Department for carrying out the provisions of the Forest Reserve Lieu Land Act, brought to the notice of the Court, nor was the act of March 3, 1891, repealing the provisions of the pre-emption law, brought to his notice, nor did it appear that the land in controversy was in the actual possession of anyone at the time of selection, nor that any mineral of any character had ever been discovered thereon, nor that any contest was ever pending or initiated in the Land Office in respect to the selection under which the complainant there claimed; and further said, but on the contrary, that the selection was filed and *accepted by the Register and Receiver of the Local Land Office*, the records of which showed the lands to be vacant and open to settlement, and as a matter of fact, the land was vacant and unoccupied, and that the defendants in that suit had gone upon the land and marked the boundaries of a mining claim,

and posted a notice claiming it as such, without making any discovery of mineral, and then leaving and never returning, and under those circumstances, after stating the terms of the statute and quoting from his opinion in the *Olive Land* case, he said, from these provisions it is clear that in such cases of exchange, title is to be given by the Government for title received, and in cases of unperfected claims, the claimant is to occupy a precisely similar status in respect to the land selected as he did regarding that relinquished. In all cases the land authorized to be selected in lieu of that relinquished is required to be vacant and open to settlement. When? Manifestly, at the date of selection. It is upon its then character and condition that the selector has the right and is bound to act. Before making his selection he must inform himself of the character and condition of the tract desired, but it would be wholly unreasonable to say that he is required to make a selection based upon what may be disclosed in that regard in the future. The right to select is by the statute given to the party invited by the government to make the exchange without other condition than that the land selected shall be vacant and open to settlement. Neither the act of the selector, however, in making the selection, *nor that of the officers of the Local Land Office*, upon whose books the selected tract appears to be vacant and open to settlement, *in accepting and filing the selection*, is conclusive of the then character and condition of the land. Presumptively the character and condition of the selected tract is such as is indicated by the books of the Land Office, and therefore the selection, *with the approval* of the *officers* of the *Local Land Office*, of a tract appearing upon the books as vacant and open to settlement, in lieu of a similar tract of like dimensions relinquished to the

government, gives an equity in the selector which entitles him to protection until the fact in respect to the character and condition of the selected land is, upon proper notice to the equity claimant, otherwise determined by the Land Department. The right to make that inquiry extends to the time of the issuance of the patent contemplated and provided for by the statute * * * but this inquiry, as has been said, is limited to the character and condition of the land at the time of its selection (Transcript, No. 217, pp. 50-51).

Then further along, and after referring again to the act of June 4, 1897, and considering to some extent the provisions of the revised statutes clothing the Land Department with the power to administer the laws for the disposition of the public lands and to make regulations necessary for that purpose, and after saying that such rules and regulations must be reasonable, he said:

"As has been stated, it did not appear in the case of *Olive Land & Development Company* vs. *Olmstead*, that any rules or regulations had ever been made pursuant to the provisions of the act of June 4, 1897, but that case there rested in that respect upon the admitted averment of the bill that the selection under which the complainant there claimed was *filed and accepted by the Register and Receiver* of the *Local Land Office*. In the absence of all rules and regulations upon the subject, the Court, and I think properly, treated such acceptance as *an approval of the selection*, which satisfied the condition prescribed by the statute and completed the *selection and exchange*, leaving only in the officers of the General Land Office the right of inquiry into the facts and conditions of exchange antedating its consummation. The selection, as has been seen, consists of two things, first, the *act of selection* upon *the part of the selector*, and second, *the approval*

of *his selection* by *the Land Department*. Both acts are essential to constitute the selection authorized by the statute, but it cannot be that Congress intended that the exchange once made should be rendered nugatory by any future discovery of mineral."

And here he cites *Shaw* vs. *Kellogg*, 170 U. S., 312, 332, and other cases (No. 217, p. 53).

Now from what we have here quoted and stated in reference to the decision, it will be seen that in the *Olive Land* case, Judge Ross, not having his attention called to the regulation of the Department which directed that in the administration of this law the applicant should present the papers to the Local Officers to be transmitted to Washington for their consideration, had fallen into the notion that when the papers were presented to the Local Officers they passed in the first instance at least upon the question of whether the conditions of the act were complied with and the land subject to selection, and that their action was an approval of the selection; in other words, that the case stood precisely as in the other cases to which we have referred. Take for instance the pre-emption law; where the pre-emptor makes his proof to the Local Officers, and if they are satisfied upon the proofs they accept his money for the lands and issue to him a patent receipt. So here the Honorable Judge of the Circuit Court in the previous case had supposed that when these papers were presented to the local officers the matter was examined and the selection was approved by them, and entered upon the Land Office Records, and the deed accepted, which latter act constituted the payment of the consideration. And while it was still open to attack, while this was not finally conclusive upon the Department, but their jurisdiction to inquire continued until the issuance of the patent,

yet, nevertheless, that an equity had vested. We may say here, however, that with respect even to pre-emption and homestead claimants the acceptance of money by the Local Officers, or admitting the final entry of a homestead claimant, vests, if we may be allowed the expression, only an inchoate equity, for the practice in the Land Department is that all of these matters go before the Commissioner of the Land Office whether there is any appeal or not, and he there examines the papers and the evidence, and if upon the face of the evidence itself he is not satisfied that the law has been complied with, he may reject it. Usually, if the only objection is that the proof is simply defective, he refers the matter back to the Local Officers to take further evidence upon the points upon which he is not satisfied. But this is a matter in his discretion, and it is not until the Commissioner has approved, *that this full and complete equitable title has vested.* Whether this principle applies only to the government is not a matter of sufficient importance to be inquired into here. It may be that after the decision of the Local Officers the right is no longer open to controversy so far as third parties are concerned, and we are rather disposed to think that this is the case. In fact, a case upon which much stress has been laid by our adversaries throughout this controversy seems to imply as much. We refer to the case of *White* vs. *Dubois*, 21 Fed. Rep., 693, which was heard before his Honor Mr. Justice Brewer. It is the case upon which our adversaries rely for the purpose of proving that the protests in the mandamus case at least, and perhaps in the other, are a false quantity, and amounts to nothing, notwithstanding that it is brought into the record as a part of the case made by the petitioner for the writ. But in that case, which was an application for a patent for a mine,

and we think the patent had been issued, the notice had been published as required by the act of Congress, and the party had failed to contest the issuance of the patent. And in such case Mr. Justice Brewer held, that he loses all right to contest. He may afterwards object or protest, but when he does this, he does not thereby bring before the tribunal his own right, which may have existed before he made default. That while possibly under such circumstances the protest might bring on a controversy in a Court of competent jurisdiction, yet even there he would be more in the nature of an *amicus curiæ*, not litigating for his own right, but simply aiding the government in opposing the issuance of a patent, or at least, the inquiry as to whether a patent ought to issue to the claimant.

It will be noted in our case that the protest was filed within the time prescribed by the statute, as shown both in the bills in the equity cases and in the mandamus case. And by whatever name it may have have been called, it was an opposition to the issuance of the patent, and raised the controversy between the parties, and was a part of the record before the Honorable Secretary of the Interior when these controversies were heard before him and decided by him. It was out of the protests and affidavits which accompanied them and constituted a part of them that the controversy was made with the applicant, in the Department.

As the right to reply to what we here have said is given to our adversaries, we desire to call attention to what was actually decided in a case that they may use against us upon this proposition. It is that of *Shaw* vs. *Kellogg*, 170 U. S., 312. The case is cited in the opinion of the Secretary of the Interior published in the transcript of the record in No. 632, at p. 92, for the purpose of fixing the meaning of the word "vacant", and wherein it

was said that the "Grantees, the Vaca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others. The lands must be vacant," and is cited also for the purpose of proving that the point of time at which the existence of mineral should be known was at the date of selection. That case is no authority for the proposition that the mere designation of the land by the selector makes a selection. But as will appear in the opinion in that case by the Act of July 22, 1854, 10 Stat., 308, the office of Surveyor General of New Mexico was created and it was made his duty to examine into all claims for lands within the limits of their territory, and make full report to Congress. In pursuance of this authority he did examine and report on various claims, and on June 21, 1860, Congress passed an act, 12 Stat., 71, confirming several of these reports. There were two opposing claims for large tracts in the vicinity of Las Vegas, and in settling the dispute between them Congress enacted in Section 6 that it should be lawful for the Vaca heirs, who made claim to the Town of Las Vegas, to select instead of the land claimed by them an equal quantity of vacant land not mineral in the territory, to be located, in square bodies, not exceeding five in number, and declared that it should be the duty of the Surveyor General of New Mexico to make surveys and *location of the land so selected by the said heirs when by them required*, and limited the right of location to three years (see Statement of Fact, *Shaw* vs. *Kellogg*, 170 U. S., 313-314, and see also the letter of instructions to the Surveyor General from the Land Department, 314, 315). One of these instructions was that:

"In either case the final condition that the certificate to this office must be accompanied by a

statement from yourself (the Surveyor General) and the Register and Receiver that the land is vacant and not mineral" (*Id.*, p. 315).

And Mr. Justice BREWER in delivering the opinion said, among other things:

"In this, three things are to be noticed: First, that the Surveyor General, *the officer specially designated to make the survey and location*, the one primarily charged with the duty *of determining its character*, decided that the land was non-mineral, * * * and so far as his action is concerned, there was an *adjudication* that the land was non-mineral. Second, the Land Department directed the matter to be closed, specified how it should be closed, and received and filed without question the report of the Surveyor-General's action. Third, the only qualification * * * was, it was subject to the conditions and provisos of Section 6 of the Act of Congress June 21, 1860; there was no reservation of further action by the Land Department or Surveyor-General. There was a finality so far as they were concerned."

And then his Honor proceeded to say in effect that that deed decided the character of the land, that it was the duty of the Land Department to decide—not to decline to decide—this duty it could not evade. It was a question for its action then. And in short it was held that that action was final, and the Department could not make that decision depend upon the question of whether mineral should be thereafter found therein or not (170 U. S., pp. 337-338).

Now in many cases it has been held that the administration of the laws and the duty of determining rest with the Land Department unless the act itself provided another tribunal, and what was decided here was that the terms and provisions of the act in question did confer upon the Surveyor-General powers which he does not ordinarily

possess. That is, the power, when required by these parties, to make a survey and location of the land selected by them, and that he was empowered to decide in the first instance as to whether the lands were mineral or not, and that both he and the Register and Receiver did so decide, and that their report or their decision was accepted by the Department of the Interior, and that consequently the lands *had been selected* within the meaning of that term as we have heretofore defined it; that is, the selection had been made by the party and it had been approved by the Department.

Third.

We proceed now to consider a little further the allegations contained in the bills in these cases upon the question of the non-occupancy of these lands. In the opinion of the Circuit Court of Appeals, after a brief statement of the facts, his Honor Judge Hawley, in delivering the principal opinion in the case, and after saying that the legal questions involved in the cases on appeal were identical and the facts were substantially the same, and pointing out the differences existing between the two, and stating the proceedings out of which the controversy arose, said:

"This appeal is taken only from the order and decree sustaining the demurrer and dismissing the bill. The discussion of these questions will be confined to the facts alleged in the bill" (Transcript in the *Cosmos* case, No. 217, p. 70).

And he then proceeds to that discussion. There is no question but that as to the first two or three questions considered, all that is neces-

sary for the determination of these questions appeared upon the face of the bill. The first point decided was

"that the Federal Courts are without jurisdiction to entertain the suit to determine the respective rights of the parties to any lands to which the title remains in the government of the United States, in regard to which, as shown by the averments of the present bill, a contest between the parties is pending in the Land Department of the government" (*Id.*, p. 71).

It does distinctly appear upon the face of the bill that this controversy before the Land Department existed. Therefore, if the principle there decided is correct, the decree of the Circuit Court is correct. The next point decided is that an action of ejectment cannot be maintained in the Courts of the United States on a merely equitable title. Now we call attention to the prayer of this bill, wherein a judgment is asked that the complainant have the full and complete equitable title, and that complainant have *judgment for the possession thereof* (*Id.*, p. 17). If, therefore, this point was decided correctly the relief there sought cannot be obtained in this case. The third point is that the Circuit Court had no jurisdiction to try the title to the property or adjudge the complainant to be put in possession of the property, and these propositions are supported by the authorities which are cited (*Id.*, pp. 71, 73). It is also said (p. 71) that "the averments of the bill are susceptible of the construction that the defendants are in possession of the land in controversy." We submit that they are not susceptible of any other construction. The allegations in this respect are that "These defendants did enter upon this property, and erect derricks or other machinery thereon, and proceeded to excavate the soil thereon, and bore wells, and drive iron pipes therein and seek petroleum or other

products for the purpose of taking the same for their own use and removing the same, and thereafter, and about the last of February, 1900, they did discover in said wells oil in profitable quantities, and are now, without the consent of Clarke or the complainant, *in possession of said premises*, and were pumping large quantities of petroleum oil from said wells," etc. If, therefore, it be true that upon the case made here this bill could not be maintained upon the grounds already mentioned, it would be immaterial, or at least will not at all affect the correctness of the judgment, whether the Court of Appeals was or was not correct in saying that from the facts appearing upon this bill the lands were not vacant. But we proceed now to consider the question of what appears upon this bill in that respect.

We have called attention to the opening brief as to these allegations, and here again show that in the 5th paragraph of the bill in the *Cosmos* case, No. 217, on page 5, it is alleged that for more than a year prior to the 9th of December, 1899, these lots one and two of the southwest quarter of section thirty, etc., were, and for more than a year theretofore had been, a tract of *surveyed, unappropriated and vacant public land of the United States*, open to settlement, returned and characterized upon the official records, etc. Furthermore: On the 8th of December, 1899, Clarke delivered to the Register and Receiver the deed, and at the same time a non-mineral affidavit, showing the selected tract *contained no known minerals*, and at the same time delivered his abstract, etc. Note: It is not alleged that he filed any affidavit stating either that the lands were vacant or that they were not occupied (Paragraph 7 of the bill, transcript, pp. 5 and 6). In paragraph 8, page 6, we are told what the Register and Receiver's certificates certified,

namely, that the land was free from conflict and there was no adverse filing, entry or claim thereto. Now it is alleged in paragraph 9 that on the 16th of November, 1899, Clarke was the owner of another tract of land in a forest reserve covered by a patent, and in paragraph 10, on the 8th of December, 1899, lots one and two on the northwest quarter of section thirty, etc., were in the same condition as had been alleged with reference to the southwest quarter, namely, surveyed, unappropriated and vacant public lands. And in paragraph 11, page 7, is alleged the filing of a non-mineral affidavit with respect to this last quarter section, but not an affidavit of non-occupancy. And, "On the 8th of December, the Register and Receiver accepted, received and filed the deed * * * non-mineral affidavit and selection" (*Id.*, paragraph 12, page 7), but not any affidavit of non-occupancy. When the amended selections were made, he says they were accompanied by a non-mineral affidavit, but not an affidavit of non-occupancy (Paragraph 13, pp. 8 and 9), and again alleging that the tracts were surveyed, unappropriated and vacant public lands of the United States. In paragraph 16, page 10, *et seq*, it is stated that the grounds upon which these defendants claim were certain mining locations, and these mining locations are attacked for certain specified reasons, but not for the reason that these parties had not marked their boundaries and filed their claim in the office of the Recorder, or had not entered into the possession, or that they had merely done these things and left the premises without anything further, nor do they ever allege that from the moment of the mining locations until the filing of the bill there was ever any time when these defendants or their predecessors in interest were not in the possession of these lands.

And, as we have said before, they do not allege that on or about the 1st of February, 1900, these defendants took possession of this property for the first time, or took possession of it at all On the contrary, what they say is that

"On or about the 1st day of February, 1900, and at numerous times since such date, they had, by themselves and their employees, without right, title or claim so to do, wrongfully and unlawfully and without the knowledge or consent of said Clarke, and in disregard of the rights of said Clarke, enter into and upon the fractional west half of section thirty," etc., "*and erect derricks, and other machinery thereon, and proceed to excavate the soil thereof, and to bore wells, and to drive iron pipes therein*" etc.

And again, that afterwards, on or about the last of February, 1900, they discovered and found the petroleum in said wells, and that "defendants are now wrongfully and unlawfully and without the consent of said Clarke, and without the consent of your orator, in possession of said premises (Transcript, p. 14, paragraph 19). It is a well-known rule of pleading that the pleading is to be construed most strongly against the pleader, and here unless we except for the moment the word "vacant" in the places to which we have referred there is no distinct allegation that these defendants entered upon this property for the first time on the first of February, nor is there any allegation that is at all inconsistent with the fact that they were in the possession all the time, and that what they are really making the foundation of their claim is, that they did not make a discovery of oil until about the last of February, and did not begin to bore or sink an *oil well* until about the first of February, and that this was after their selection. The next question then is, what signification shall we attach to the

use of the word "vacant" as it occurs in the two or three places above referred to?

We were asked at the oral argument if "vacant" means un-occupied, then did they not allege that it is un-occupied? Such a meaning might be supposed to attach to the word, even as used by them, in some circumstances, but we submit that that was not their meaning, and in considering this complaint, like the consideration of any other instrument, we are to look, not to what might possibly have been the meaning, or what meaning somebody else attaches to the word, but to what the pleader meant. We say that what he meant is made perfectly apparent from one end of this controversy, both in the Courts and the Land Department, to the other. In the brief filed in this cause they tell us that in their dictionary "vacant lands", as applied to public lands, always has had reference to, and the unvaried meaning of it is, subject to disposal, subject to entry, not appropriated under the laws for disposal of the public domain, and has never had reference to the condition of the land as being occupied, or unoccupied, by persons who had not acquired any right under the land laws to private appropriation of the land (see Brief in this case, p. 79). And the entire argument made under this caption is directed to the purpose of showing to this Court that that is what "vacant" meant in the Forest Reserve Lieu Land Act, viz., unappropriated on the tract books, and that it had no reference to the physical facts on the land.

When the controversy was before the Land Department the Honorable Secretary of the Interior states in his opinion what were the principal contentions of the respective parties, and he says Clarke has appealed to the Department. His principal contentions substantially are:

"(1), that the equitable title to lands selected under the act of June 4, 1897, in lieu of patented lands relinquished, vests at the date of selection and cannot be impaired by subsequent mineral discoveries in the land; (2), that lands *are vacant* and *open to settlement*, and hence subject to selection under said act, *when no other claim thereto is disclosed by the Land Office records*, unless at the date of location they are known to contain minerals to such an extent as to make them more valuable on account thereof than for agricultural purposes; (3), that the protests do not show the selected lands to have been covered *by any other claim of record*, or to have been known to be more valuable for mineral than for agricultural purposes at the date when the selections were filed, and are therefore insufficient to justify a hearing" (see the Opinion in 30 L. D., 554, also published in No. 632, the Mandamus Case, p. 82).

He then proceeds to state the opposing contentions of the contestants and appellees. Now we call attention to the opinion of the Circuit Court of Appeals, delivered by Judge Hawley, found in the *Cosmos* Company's case, No. 217, commencing at page 70. The particular part to which we call attention will be found on page 74, where Judge HAWLEY says:

"The principal contentions of the respective parties, in their briefs and upon the oral arguments, may be briefly stated as follows: On the part of the appellant, (1) that lands *are vacant* and *open to settlement*, hence subject to selection under said act, when no *other claim thereto* is *disclosed* by the *Land Office records*, unless at the date of selection they are known to contain minerals to such an extent as to make them more valuable on account thereof than for agricultural purposes."

Then follow other propositions, but not material to the present controversy. And if we may be permitted to invite this Court's attention to

what they have said in the petition for the writ of mandamus (No. 632), your Honors will find on page 6 of the transcript in that case, and in paragraph No. 76 in the petition, the following: That the meaning of the words "vacant lands open to settlement" as used in the last-mentioned act, and as established under congressional, judicial and departmental uses, the interpretation is to be "land appearing *on the records of the Land Department* as *land not taken by an individual*, or, as decided by defendant" (meaning the Secretary of the Interior) "in the case of *F. A. Hyde*, 28 L. D., 284, 287, any public land to which rights may be initiated by settlement under existing laws, and the act in itself prescribes no other condition precedent to selection." We thus have their own interpretation or definition of the word as used by them, many times repeated, and in view of the silence of this bill, the failure to negative the occupancy of these lands, we submit that they did not by the use of the word "vacant" in those particular passages to which we have called attention, mean anything else than just what they say. That was the manner in which they presented the case to the Circuit Court of Appeals. It was the manner in which it was presented to the Land Department. The judgment of both tribunals, upon the rights of the parties in these causes, was invoked upon that theory, and it is submitted that they should not be permitted to shift their ground before this Court, and ask its judgment as to the sufficiency of the bill, with its terms interpreted differently from what they themselves had construed it to mean in the court whose judgment they now seek to overthrow, and that upon the face of the bill the Court did not err in sustaining the demurrer upon the ground that the lands were not vacant within the meaning of that

statute, but were in the occupancy of these defendants.

As we have already stated, the opinion of the Circuit Court of Appeals itself contains a brief upon this question of the meaning of the word "vacant", and it is unnecessary to cite further authorities. But we take the privilege again to repeat that for the purpose of determining whether the demurrer was properly sustained to the bill, we are not asking that anything be read into the bill. What we claim is that to interpret the judgment dismissing that bill as being one based solely upon the order of the Judge sustaining the demurrer to the bill, is too narrow a construction of that decree, and that Judge Ross' opinion clearly shows that he did not dismiss the bill solely upon the ground that it was in itself insufficient. Of course, he did hold with us upon the demurrer that it was insufficient, but he also shows in his opinion that in dismissing the bill he acted, in part at least, upon the fact that it appeared to him from the affidavits that the bills themselves were filed in furtherance of a fraud. And that our position may be here made clear upon this matter we repeat what we have said in oral argument that, if it was not in the power of the Judge to dismiss a bill, however perfect in form, and however sufficient its allegations, if by any means it was made to appear to him that its object was to consummate a fraud, or carry into effect some scheme in violation of the statutes of the United States or public policy, then the additional record in the *Pacific Land & Improvement Company* case is entirely irrelative and immaterial, and has no function to perform in the controversy as it appears here. But if, on the contrary, where though a bill should state a perfect cause of action, good both in form and in substance, yet when it was made to appear to the

Court that it was being used for the accomplishment of some purpose that was illegal, the Court has the power to dismiss it regardless of its perfection as a pleading, then it is submitted that the question of whether that power was correctly exercised in the present cases or not, could only be determined by the inspection of the facts appearing before the Court upon which that decree was founded in part. If that was correct on any ground, it should be affirmed.

We also call attention to the 21st paragraph of the petition for the writ of mandamus, p. 15 of the record in Case No. 632, where the petitioner says that he did allege non-occupancy as *understood* by the law and practice of the Land Department.

For the allegations of the bill upon these questions in the *Pacific Land and Improvement Company's* Case No. 218, see

Pp. 5 & 6—Par. VI.
6 —Par. VII.
6 & 7—Par. VIII.
7 & 8—Par. X.

And in Par. 41, pp. 8 & 9 will be found the alleged defects in the mining locations.

In the Pacific case the land claimed by complainant is the E. 72 of S. W. 74, Sec. 4, and the mining location covered the whole of the S. W. 74, Sec. 4, and we call attention to another significant fact, that while they alleged that no petroleum had been found on the land in controversy, that is, the E. 72 of S.W. 74, they allege that petroleum had not been found on the S. W. 74 of Sec. 4, *in paying quantities.*

Fourth.

The various acts which have been cited here for the purpose of proving that the term "vacant" always means what our adversaries say it does, will be found mentioned in the brief of the appellants, pages 81 and 82. A glance at the list will show how impossible it would be, in the time limited to us for filing this brief, to read them, or the half of them, much less to comment upon them. We content ourselves with saying that, so far as we could perceive, we find just exactly what we should expect to find, that they either do not support the contention at all, or that where they do give coloring to the interpretation claimed, the context and the subject-matter generally make that fact apparent. We shall refer to one or two upon which particular stress seems to be placed. The act of March 3, 1805, 2d Stat., 344, speaks of grants of land made in a certain district by the French and British governments, or by acts of Congress, and which had been surveyed, and provided for their resurvey for the purpose of separating them from the tracts of land which still belong to the United States Government. In other words, to mark the boundaries between lands which had become private lands and those the title to which was still in the Government of the United States. It is not unlike the survey of claims under the Mexican Government in the State of California. One of the particular objects which Congress had in view in creating the Board of Land Commissioners in that State, and requiring claims to be presented within a limited time, was to separate the private land claims from the public domain, and if in that act the words "vacant lands" had occurred, we should say that it manifestly meant any lands the title to which had not

passed from the Government of the United States, whether there had been a declaratory statement or other claim filed upon them, or not. The act of April 18, 1806, 2d Stat., p. 381, was another act which had for its object defining the limits of the vacant and unappropriated lands of the State of Tennessee, and which were thereafter to be subject to the sole disposition of the United States. And from that act it is manifest that in the grant of these lands to the United States Government by the States of Tennessee, and also of North Corolina, some rights had been reserved in these States to perfect claims initiated under their authority, and the purpose of that act was to give the power to the United States Government to dispose of the lands and perfect the rights, whether proceeding from themselves, or from the State within the district described. The act of May 26, 1824, required the individual owners and claimants of town or village lots, and common lots in certain towns, whose lots were confirmed by the act of June 13, 1812, on the ground of habitation, cultivation or possession prior to December 20, 1803, to proceed within a certain time to designate their lots by proving the fact of such habitation, cultivation or possession, and the boundaries and extent of each claim, so the Surveyor General could distinguish the *private* from the *vacant* lots, etc., for the support of schools as necessary, not exceeding seven-twentieths of the whole amount in his general survey of the town. We do not find anything in support of what is said of this act on page 83 of the brief of the appellants, namely, that by it all lands not occupied prior to December 18, 1803 -- twenty-one years before — were vacant whether occupied or not. But such a result in the sense of the word "vacant" that our adversaries ascribe to it may have followed. Just as in Cali-

fornia the time limit for presenting claims to the Mexican Government was two years, and it has been uniformly held that if the claims are not presented within that time the right is gone, and so the meaning of this act may have been that if these parties did not make the proof of the particular lots to which they are entitled within the time limited, they should forfeit all rights to the property and it should become again public land. But the statute does not say so. The object of the act, however, is very plain. We think the act of March 3, 1857, referred to on page 84 of the appellants' brief, does show that the word "vacant" is used in the sense claimed for it. The provisions of the law taken from the Revised Statutes in the brief, Sections 23, 47, *et seq.*, are referring to coal lands, and it is doubtful whether the term "vacant" in those provisions always bears the meaning which counsel would impose upon it, but at any rate, without further comment, we repeat that so far as our investigation has gone, the statutes in which the word "vacant" is used in that sense generally show from the context, or the subject-matter that such is the meaning, but they do not exclude from all acts any other meaning of the word, or make in the least against the authorities which we have already cited upon this subject.

And the argument comes back to the original proposition: If it can be shown that there is any case where one has such right as is recognized by the laws of the United States, and not to be upset by any doubtful construction, although his claim may be such that it is neither upon the Land Office records, nor required to be there, then it is submitted that it manifestly appears that the word "vacant" here did not mean vacant on the Land Office records. If, for instance, as we have endeavored to show by the decisions of this Court, a

mining claim can exist, be perfected, so far that the claimant has the right even as against the Government of the United States to the exclusive possession and to operate such mines, which right rests solely upon a mining location which, as we have stated, under the laws of the United States requires nothing more than marking the boundaries and discovering the mine, and need not appear upon the records of the Local Office, and that this title may be so perfect that the United States cannot affect it, then, two things are obvious, first, that "vacant" in this act did not mean vacant on the records of the Local Office, and secondly, that the regulation which requires the notice to be given, that any person having such right to protect may have the opportunity to defend it, is not merely consistent with the law and reasonable in itself, but absolutely essential to the Land Department's jurisdiction over the matter. And that when the notice is given, those who have, or claim to have such rights, have the right to appear there and defend against the issuance of the patent, and that in this case they have done so; and the lands in controversy in the Department of the Interior in the case of *Gray Eagle Oil Company* vs. *Clarke*, 30 L. D., 570, were lots one and two of the southwest quarter and lots one and two of the northwest quarter of section 30, township 28 south, range 28 east, M. D. B. & M., and are the same lands which are involved in the controversy before this Court in the *Cosmos Exploration Company* vs. *Gray Eagle Oil Company et al.*, as will be seen by a reference to paragraph 3, page 4, of the transcript in that case, No. 217, and are also described in paragraph 6 on page 5, and in paragraph 10, pages 6 and 7, and that that controversy which is spoken of in the bill in this case of the *Cosmos Exploration Company* vs. *Gray Eagle Oil Company et al.*,

which was then pending before the Land Department, has been decided by the Land Department, and that the decision is against the appellants, and their application is rejected, and that is the end of the matter. The opinion, which has been several times referred to, delivered by the Secretary of the Interior, shows the character of the controversy between the parties, and from it, it will manifestly appear that that Department had jurisdiction over the subject-matter and the parties, and the judgment is final. No better proof could be offered, no more conclusive authority cited, to support the proposition that the bill to quiet a title or an action to recover the possession of public lands while a controversy between the parties is pending and undetermined before the United States Land Department, and that if there were no other reason for the affirmance of the judgment, this of itself is sufficient.

Fifth.

It has been persistently brought before every tribunal where this controversy is pending, that the United States survey had shown this land to be agricultural. Assuming that to be true from the face of the allegations of the bill, it does not amount to anything. The value of these surveys was considered by this Court in the case of *Barden* v. *Northern Pacific Railway Company*, 154 U. S., 288, already cited many times, and it is there shown that these reports of surveyors merely add to the general information of the Government concerning the condition of its public lands, that their reports have nothing of a conclusive nature, and are indeed of but little value, that they are not author-

ized by the Government of the United States to determine the character of the lands at all, and the opinion which is expressed by this Court is shown in the same opinion, to be the judgment of the Land Department (see *Markley's* case, there referred to).

Sixth.

Reference has been repeatedly made to the act of 1883, designed to protect the United States against enclosures of enormous tracts of land and thereby preventing, or at least impeding, the settlement and occupation of those lands by others. This act had been in force for fourteen years before the Forest Reserve Act was passed, and it never had in any case been held to modify in any way the principles which are laid down in *Atherton* vs. *Fowler*, and which principles had been extended to the occupancy of all classes of lands where such occupancy had the sanction of the United States Government. And as to those enclosures of thousands and tens of thousands of acres for mere grazing purposes, we are not aware that there ever was any act of Congress directly sanctioning or authorizing them, still less inviting and encouraging them. But where the United States has by its laws invited and encouraged the occupancy of lands for particular purposes, it has been invariably decided, as we have already shown in the opening brief, that the invasion of that occupancy by others will not be sanctioned or tolerated. Such was the view in *Atherton* vs. *Fowler*, and in the other cases cited in the opinion of his Honor Judge Hawley in the Circuit Court of Appeals in these cases, and those already cited in the opening brief. And it was

shown by Judge Hawley that this doctrine has been applied to lands claimed for mining purposes as well as any other (see particularly *Crossman* vs. *Pendery*, 8 Fed. Rep., 693; *Field* vs. *Grey*, 1 Ariz., 404; *Lincoln, Lucky & Lee M. Co.* vs. *Hendry*, 50 Pac., 330). The occupation and exploration of the mineral lands and the development of the mineral resources are invited and encouraged by the acts of Congress of the United States. And in these cases, as already stated, it is shown that the lands had been claimed as mining claims, and the bills point out what the pleader claims was the defect, and it does not attack them on the ground either that there had been no notice of the location, or that the claim had not been marked so that its boundaries could be readily traced, or that there was no record of the notice, nor is it anywhere alleged in general terms that the claimants or their predecessors in interest were in ignorance of the mining locations. The question was asked at the oral argument as to whether these notices were not recorded and known to them at the time of the relinquishment. The answer was that they did not have notice at that time. But it is submitted that knowledge of the character of the lands relinquished is of course possessed by the party relinquishing it, and the tract which they are to investigate at the time of the selection is the tract selected. That at that time these notices were of record, is impliedly admitted, and the claim had been marked so that the boundaries of the location could be readily traced. They therefore did have notice, and certainly there is no case to which the doctrines applied here in the Circuit Court of Appeals can more justly be invoked than in just such cases. These were petroleum lands. The mineral products lie far below the surface, and in order to make such a discovery as the appellants are contending for

namely, that they shall develop the fact that the oil not only exists in the claim, but in paying quantities, is the work of considerable time and a large expenditure of money. Both parties in these cases were ready to invest upon the indications there existing, and the result proved that their judgment was correct. And we say again that in no case ought greater liberality be extended in the application of these principles of protecting an occupant in the possession of the property while making such exploration.

It is needless to extend this discussion, which is here entered into again for the purpose of making the position of the respective parties clear. The principles which underlie these causes, and which will themselves determine it, are quite fully discussed and authorities cited in the brief already filed, and that it has not been decided by any Court, either the Circuit Court, or Circuit Court of Appeals, nor by the Land Department, that an equitable title vests by the mere presentation of these papers, and the only question of difference between the Land Department and the appellees is in what we have stated, namely, whether the discovery of mineral after the presentation of the application, and before an equitable title vests, would of itself prevent the selection from being approved, a question which as we have said before, we think is not of controlling influence in the present cases. In neither case is any legal or equitable title shown, and therefore neither suit could be maintained. The bill in neither case states that any cause for legal or equitable relief, without the slightest regard to whether evidence of the discovery of mineral after the presentation of the papers to the Local Officers would or would not be admissible in evidence in a controversy where that question would be of importance.

But if it be deemed of importance here it is submitted that such discovery prior to the time the equitable title vests proves that the land never was open to settlement.

Respectfully submitted,

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